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No. 01-419

IN THE SUPREME COURT OF THE UNITED STATES

CITY OF COLUMBUS,
PETITIONER,

v.

OURS GARAGE AND WRECKING SERVICE,
RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICUS CURIAE OF COALITION FOR LOCAL SOVEREIGNTY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED –

May Congress Constitutionally Preempt municipal safety regulations regarding local tow-truck operations?

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INTEREST OF AMICUS CURIAE[1]

Coalition for Local Sovereignty is made up of state, local and tribal officials, as well as concerned citizens, working to uphold the principle of local self-government and community based decision making. As the only national organization dedicated exclusively to the restoration of local self-government, we possess a unique perspective on such cases.

Counsel to the petitioner and counsel to the respondents have consented to the filing of this amicus brief. Consent letters are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

The issues raised in this case present fundamental questions about the division between local and national issues: which areas of regulation are appropriate for Congress and which areas are reserved to State and local government within the true meaning of the Tenth Amendment.

Since this Court handed down its decision in *Lopez v. US* (514 US 550) seven years ago, there has been renewed uncertainty about the extent of Congress' commerce clause powers, because this Court has seemed to take a significant step back from earlier decisions yet without explicitly overruling them. Various members of this Court (Justice Souter in dissent, but also Justice Thomas in concurrence) suggested that *Lopez* was in fact a substantial modification of this Court's commerce clause jurisprudence.

We believe that this Court's commerce clause jurisprudence could be clarified greatly in the current case by explicitly overruling some of the earlier decisions which no longer seem valid in light of recent decisions, and setting forth clear boundaries between federal and local powers.

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[1] This brief was authored by counsel for Coalition for Local Sovereignty, no other person has made any monetary contribution for its preparation or submission.

In *Garcia v. San Antonio* (469 U. S. 528 (1985)), by a 5-4 vote, the majority declared that whatever limitations there were on the commerce clause powers of Congress that Congress alone was to decide those limits. Although *Garcia* has never been explicitly overruled (and this reasoning about the scope of the commerce clause power could perhaps be considered mere dicta, not requiring an explicit renunciation) the view that commerce clause power is to be determined exclusively by the legislative branch has been quite openly rejected in *New York v. US* (505 U. S. 144 (1992)), *Lopez v. US* (1995) and *Printz v. US* (521 US 98 (1997)), and *US v. Morrison* (# 99 - 5). In each of which cases this Court has rejected the *Garcia* reasoning and embraced the view that this Court will enforce limits on the power of Congress under the commerce clause.

Since *Garcia* has been implicitly undermined by more recent decisions (*Lopez*, et al), it ought to be explicitly abandoned.

If *Garcia* has been implicitly overruled it would make sense to return to something like the *status quo ante*, as expressed in *National League of Cities v. Usery* (426 U.S. 833 (1976), in which the court noted that traditional areas of local responsibility (or police powers) were a buffer to the commerce clause powers of Congress, an approach suggested by Justice Scalia in *Lopez*, as well as by later decisions.

A proper analysis of the limits of the commerce clause must focus not simply on the effect of economic regulation but take into account the broader understanding of what areas are of "traditional state concern" and thus fall under the police powers of the local community.

ARGUMENT

I. Lopez and its progeny have created a need for greater clarity in defining the limits of Commerce Clause power.

This Court has repeatedly noted, most recently in *Jones v. US* [#99-5739, (2000)] that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, the Court's duty is to adopt the latter." Following that rule in the current case this Court might be tempted to simply rule that given the questionable constitutional nature of Congress preempting municipal licensing and safety regulations that 49 U.S.C. 14501(c) should be interpreted as allowing the city regulations at issue in the current case.

There is much to be said for the Second Circuit's conclusion that:

> Congress' aim to leave the states' residual control over safety and other local concerns intact, and the presumption against preemption of historic state police power, argue against finding preemption where only incidental economic burdens can be discerned. In the present circumstances, where these competing concerns collide, we are persuaded, for reasons we will explain in a moment, that the starting presumption against preemption of state law has not been overcome. [*Ace Auto Body v City of N.Y.*]

Nevertheless, we believe that a narrow ruling by this Court focusing on statutory interpretation would leave very important constitutional questions unanswered. While the Court tries to avoid ruling on broad constitutional questions where they can be avoided, in his concurring opinion in *Lopez*, Justice Thomas wrote: "At an appropriate juncture, I think we must modify our

Commerce Clause jurisprudence." We respectfully submit that the time has arrived.

We believe that this Court has a duty to give clear instruction to lower courts as well as to Congress and local governments regarding the proper division of powers and the limits of Congress' commerce clause powers.

There was a time that the Court's commerce clause jurisprudence was so ambiguous that it provided no clear guide. As David Currie has written about the state of commerce clause jurisprudence at the turn of the last century:

> Prediction of the fate of any state law had become extremely hazardous. None of the Court's tests suggested clear solutions to particular controversies, and the Justices had compounded the confusion by employing different tests in successive cases. Nor were the results easy to reconcile on any theory; by the time Fuller's term began there were precedents to justify almost anything the Court choose to decide.[2]

Something similar seems to have now occurred since the decision in *Lopez*. It is hard to see how *Lopez* and earlier decisions such as *Garcia* and, perhaps, *Wickard* (317 U. S. 111 (1942)), can all be considered "good law."

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[2] David Currie, *Constitution in the Supreme Court: The Second Century* (U. Of Chicago, 1990), 31.

II. Commerce power is limited by States' traditional Police Powers

Congressional preemption of the type of local safety regulations involving tow-trucks and tow-truck licencing being challenged by the City of Columbus, clearly goes beyond the powers of Congress under the ability to regulate commerce among the states, and intrudes into an area of law reserved "to the States or to the people."[3]

In Federalist 45 James Madison wrote:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

These words have been cited by this court over and over in recent years as the central expression of the founders regarding the division of powers between local and national government, particularly with reference to analyzing the commerce clause powers of Congress (e.g. dissent in *Garcia*, *Gregory v Ashcroft* (501 U. S. 452 (1991)), , *New York v. US*, *Lopez v. US*, *Printz v. US*).

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[3] It is not our intention in this brief to discuss at length the proper interpretation of 49 U.S.C. §§ 14501 which is being adequately address elsewhere, but to suggest a broader approach which the Court might adopt and which could clarify broader Constitutional issues.

Over the last 70 years, the powers of Congress to legislate under the banner of the "commerce clause" grew at a rapid and constant rate. There is no need to summarize that line of cases here, which is well known to this Court, but suffice it to say that the power of the several states to regulate internal commerce went from an "immense mass of legislation which embraces everything within the territory of a state" (*Gibbons v Ogden*, (9 Wheat. 1,6 (1824)) to power bordering on the trivial and insignificant (*Garcia* dissent (469 U.S. 528, at 575). This expansion reached its furthest limit in *Garcia v. San Antonio* when the Court ruled by a 5 to 4 margin that, in effect, the Constitution placed no limits upon what Congress could legislate under the commerce clause, but that the outer limits of the commerce clause power was a "political question" to be decided by the ordinary political process. The majority asserted that:

> the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government [i.e. Congress] itself, rather than in discrete limitations on the objects of federal authority. . . . The political process ensures that laws that unduly burden the States will not be promulgated.[4]

As Justice Powell wrote for the dissent which included Justices Rehnquist and O'Connor:

> Today's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the

[4] This doctrine had roots in *Wickard v. Filburn* which declared "*effective* restraints on . . . exercise [of the commerce power] must proceed from political rather than from judicial processes," 317 U.S., at 120. We believe there is more than ample historical evidence against this assertion.

> Commerce Clause . . . the extent to which the States may exercise their authority, when Congress purports to act under the Commerce Clause, henceforth is to be determined from time to time by political decisions made by members of the Federal Government, decisions the Court says will not be subject to judicial review. I note that it does not seem to have occurred to the Court that it - an unelected majority of five Justices - today rejects almost 200 years of the understanding of the constitutional status of federalism. In doing so, there is only a single passing reference to the Tenth Amendment. Nor is so much as a dictum of any court cited in support of the view that the role of the States in the federal system may depend upon the grace of elected federal officials, rather than on the Constitution as interpreted by this Court. [469 U.S. 528 at 561]

That line of cases expanding the commerce clause power came to an abrupt halt – if not an about face – in *Lopez v. US.*[5] A number of cases before and since Lopez have rejected the view that the limits of the commerce clause powers are to be left at the discretion of Congress. In both *New York v. US* (1992) and *Printz v. US* (1997), for example, this court has ruled that Congress exceeded its commerce clause authority – thus openly rejecting the central premise of the majority opinion in *Garcia*. As this Court declared in *Lopez*: 'It does not follow, however, that in every instance the Court lacks the authority and responsibility to review congressional attempts to alter the federal balance."

[5] *Lopez* declared quite humbly that "The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further." Despite such a characterization, most observers regarded *Lopez* as a substantial step back.

It was the dissent in Lopez which noted that the decision "flatly rejected" *Garcia* (Souter, in dissent sect. IIa).[6] While the majority opinion failed to make mention of Garcia, it is hard not to agree with Justice Souter on this point: *Lopez* was a complete rejection of the central tenets of *Garcia*. In seeming direct response to *Garcia* but without mentioning it by name, Justices Kennedy and O'Connor in their concurring opinion in *Lopez* declared:

> The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights even though clear and bright lines are often absent in the latter class of disputes.... But our cases do not teach that we have no role at all in determining the meaning of the Commerce Clause.

Citing this concurring opinion from *Lopez*, the Chief Justice, writing for the majority in *Morrison*, added that "the limitation of congressional authority is not solely a matter of legislative grace." The Chief Justice thus seemed to bring to conclusion the statement in his dissent in *Garcia* that "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."

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[6] In his dissent in *Morrison*, Justice Souter wrote: "The Court says both that it leaves Commerce Clause precedent undisturbed and that the Civil Rights Remedy of the Violence Against Women Act of 1994, 42 U. S. C. §§13981, exceeds Congress's power under that Clause. I find the claims irreconcilable." Souter spent several pages in his dissent defending Garcia and explaining what he saw as the contradiction between *Garcia* and the *Lopez/Morrison* cases.

It was perhaps understandable that the decision in *Lopez* should decline to explicitly overrule *Garcia*, for any number of reasons. Perhaps one reason is that it was a criminal case, as well as the desire to avoid a change which appeared too abrupt. The current case in which a city re-asserts its Tenth Amendment reserved powers in response to an overreaching of the commerce clause, is perhaps a better vehicle for addressing the federal-state balance than a criminal case.

As Justice Thomas said reflecting on the state of commerce clause jurisprudence in light of *Lopez*: "I think we must modify our Commerce Clause jurisprudence." The central tenet of *Garcia* has been rejected and is no longer "good law."

If, as we believe is abundantly clear, *Garcia* has been implicitly overturned, it makes sense to explicitly return to something like the *status quo ante*, requiring us to take a look at the case overturned by *Garcia*, *National League of Cities v. Usery* (426 U.S. 833), and the majority opinion in that case penned by a youthful Justice Rehnquist. Not only has *Garcia* been undermined (if not rejected outright), but this Court (certainly as early as 1992 in *New York v. US*) explicitly embraced the view that the Tenth Amendment and the sovereignty inherent in the States places a firm limit upon the powers Congress can exercise under the commerce clause.

It was again Justice Souter who declared in his dissent in *Morrison* that, "The Court's choice to invoke considerations of traditional state regulation in these cases is especially odd in light of a distinction recognized in the now-repudiated opinion for the Court in *Usery*." If in fact, as Justice Souter himself suggested, *Garcia* is incompatible with *Lopez* and *Morrison* then the decision in *Garcia* is de facto repudiated. If *Garcia* is no longer valid then *Usery* is once again "good law" and it makes perfect sense for this

Court to make use of the kind of analysis laid out by Justice Rehnquist in that case. In other words, it is *Garcia*, rather than *Usery* which should be considered "now-repudiated."

A. Congress' commerce clause enactments must not usurp areas of tradition local jurisdiction.

The essential question in the current case is: what are the limits of congressional power under the commerce clause in areas traditionally regulated by the states?

The decision in *National League of Cities*, of course, overturned a decision some years earlier in *Wirtz v. Maryland* (392 U.S. 183 (1968)), and the discussion of why that decision was wrong raises the crux of the issue:

> *Wirtz* relied heavily on the Court's decision in *United States v. California*, 297 U.S. 175 (1936). The opinion quotes the following language from that case:
>
> > "`[We] look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.' 297 U.S., at 185 ." 392 U.S., at 198 .
>
> But we have reaffirmed today that the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. *We think the dicta from*

> *United States v. California, simply wrong.* Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power, if unchecked, would indeed, as Mr. Justice Douglas cautioned in his dissent in *Wirtz*, allow "the National Government [to] devour the essentials of state sovereignty," 392 U.S., at 205, and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause. (426 U.S. 833, at 855; emphasis added)

Thus the Court in *Usery* says quite clearly that it should "look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon" both the federal taxing power *and* federal commerce clause power. The power to tax is the power to destroy, but just as surely the power to regulate is the power to destroy, and the power to prohibit (or preempt) is the power to destroy.

To quote the dissent in *Wirtz*:

> In the area of taxation . . . the Court has recognized that the constitutional scheme of federalism imposes limits on the power of the National Government to tax the States. The Court will not permit the Federal Government to utilize the taxing power to snuff out state sovereignty; recognizing that the power to tax is the power to destroy. The exercise of the commerce power may also destroy state sovereignty. All activities affecting commerce, even in the minutest degree, *Wickard v. Filburn*, 317 U.S. 111, may be regulated and controlled by Congress. Commercial activity of every stripe may in some way interfere "with the [interstate] flow

> of merchandise" or interstate travel. . . . If constitutional principles of federalism raise no limits to the commerce power . . . then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment. (392 U.S., at 205)

If Congress can simply preempt and supplant state regulation of any economic activity then what is left of sovereignty and separation of powers? State and local government would be reduced to a de facto subdivision, exercising only those powers Congress allows. The Tenth Amendment would not only cease to exist but be turned upside down. Rather than Congress exercising only those enumerated powers delegated to it by the States when the Constitution was adopted, state and local government would now be permitted to exercise only those powers delegated (or allowed) to them by Congress.

Justice O'Connor suggested something very similar in her spirited dissent to *Garcia*:

> Because virtually every state activity, like virtually every activity of a private individual, arguably "affects" interstate commerce, Congress can now supplant the States from the significant sphere of activities envisioned for them by the Framers. . . . As a result, there is now a real risk that Congress will gradually erase the diffusion of power between State and Nation on which the Framers based their faith in the efficiency and vitality of our Republic. . . . With the abandonment of *National League of Cities*, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint.
>
> It is not hyperbole to note that such a circumstance amounts

to a complete destruction of sovereignty. If one political entity enacts legislation only at the sufferance of another entity and that sufferance may be removed at any time, then the first entity is not truly sovereign, but dependent. The view that states can be reduced to dependent entities of the federal government (in effect, political subdivisions, rather than sovereign semi-autonomous units) was addressed and rejected by Justice Rehnquist in *National League of Cities*:

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.
>
> This is a way of saying that the Tenth Amendment encompasses more than just prohibiting Congress from exercising powers not enumerated. It points out that in exercising its enumerated powers, Congress must also respect the limits established by the division of powers. More specifically, in exercising its power to regulate commerce among the states, Congress must not usurp traditional functions of local government – commonly referred to as "police power." The powers exercised by the federal government under the commerce clause cannot become so broad that they swallow up traditional functions of local government such as education, law enforcement, emergency medical services, traffic control and the like.

This common sense understanding of the limits of the commerce clause power was articulated a century and half ago by the Court in *City of NY v Miln* (36 U.S. 102 (1837)) where it distinguished between police regulations having an effect on commerce and direct controls on interstate commerce:

Quarantine laws are commercial in their nature, and they are the regulations of the states. They have been recognized by an act of congress. (1 U. S. Stat. 619.) . . . they materially interfere with, and affect commercial and shipping transactions. . . . Health laws, poor laws, laws respecting the landing and storing of gunpowder, are all necessary for the safety and security of the particular states, or of the inhabitants of those states; and they are in nowise necessary or proper to be intrusted to the general government, and do not, therefore, come within the object for which it was established. They are not embraced within its words; and are, therefore, not taken from, but necessarily remain proper subjects of the state regulation; although they may in some respects have an influence and bearing on the commerce of the country.

This understanding of local government's police powers as a buffer on the commerce clause power of Congress follows naturally from what was articulated in *Lopez*, when the majority noted, "Were the Federal Government to take over the regulation of entire *areas of traditional state concern*, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur." Again:

> "[If] Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the[se] theories ... , it is difficult to perceive any limitation on federal power, even in *areas such as criminal law enforcement or education where States historically have been sovereign*. Thus, if we were to accept the Government's arguments, we are hard pressed to

> posit any activity by an individual that Congress is without power to regulate."

In conclusion *Lopez* noted: "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." The clear implication in these words is that the powers traditionally exercised by State and local government, help to make clear the outer limits of the commerce power.

This is certainly how these words were interpreted by a unanimous court in *Jones v. US*: "In holding that a statute making it a federal crime to possess a firearm within 1,000 feet of a school exceeded Congress' power to regulate commerce, this Court, in *United States v. Lopez*, stressed that *the area was one of traditional state concern*" (# 99-5739 at sec. b).

The Court in *US v. Morrison* once again expressed these concerns noting: "Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other *areas of traditional state regulation* since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." Thus the court in its last few decisions regarding the scope of the commerce clause has emphasized the need to prevent Congress from intruding into "areas of traditional state regulation."

It is also significant that the dissent in *Lopez* and *Morrison* also read the decisions that way. Justice Souter in *Morrison* expressed his "objection to reviving traditional state spheres of action as a consideration in commerce analysis."

B. Return to the traditional View Of local Police Powers is required by *Lopez*

We must assume that Justice Scalia in *Lopez* used the words "general police power" in their traditional and historical sense. For example, Thomas Cooley, in outlining the idea of police power inherent in each of the states wrote:

> The police power of a State, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizens with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights . . .
>
> "This police power of the State," says another eminent jurist "extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state." (Cooley, Const. Limit., Ch 16, Police Power of the States)

While, as Currie noted (op. cit.), almost any view of the commerce clause can find precedent in some ruling, the view that general police powers are an area of traditional state concern which were long regarded as exclusive to local government can hardly be contested:

It is worth quoting *Patterson v. Kentucky* (97 U.S. 501 (1878)), at some length and noting its citation on this point:

> "In the American constitutional system,' says Mr. Cooley, 'the power to establish the ordinary regulations of police has been left with the individual states, and cannot be assumed by the national government.' Cooley, Counst.

> Lom. 574. While it is confessedly difficult to mark the precise boundaries of that power, or to indicate, by any general rule, the exact limitations which the states must observe in its exercise, the existence of such a power in the states has been uniformly recognized in this court. Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; License Cases, 5 How. 504, 12 L. ed. 256; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; Henderson v. New York (Henderson v. Wickham) 92 U.S. 259 , 23 L. ed. 543; Hannibal & St. J. R. Co. v. Husen, 95 U.S. 465 , 24 L. ed. 527; Boston Beer Co. v. Massachusetts, 97 U.S. 25 , 24 L. ed. 989. It is embraced in what Mr. Chief Justice Marshall, in Gibbons v. Ogden, calls that 'immense mass of legislation' which can be most advantageously exercised by the states, and over which the national authorities cannot assume supervision or control.' [Patterson, 97 U.S. 501 at 503]

We might also site *Brown v. State of Maryland*, 12 Wheat. 445, at 447: "All those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive."

If this Court were to uphold Congressional preemption of the type of tow truck regulations at stake here, it is difficult to conceive of any rational limitations on the power of Congress. It is worth considering for example, that Congress did explicitly exempt certain types of safety regulations from preemption in 49 U.S.C. 14501. Is this exemption Constitutionally required or is the continued existence of any safety regulation which "substantially affects interstate commerce" merely exercised until Congress decides to revoke it? If Congress can preempt safety regulations for tow trucks why not passenger vehicles? Surely state licencing

requirements for passenger vehicles substantially affect interstate commerce.

We believe the answer to this question cannot be found in a mere analysis of what it means to "substantially affect interstate commerce" but must be sought in the very fabric of federalism itself, and analysis of the "traditional areas of local jurisdiction." The Second Circuit was correct in labeling the towing regulations at issue in this case an "historic state police power." Such an historic power of municipal governments may not constitutionally be absorbed by the federal government simply because they "affect commerce."

C. There are also limits implicit in the words "commerce" and "among the states"

There remain, of course, difficult questions about where a municipal police power ends and the power of Congress to regulate commerce begins. Nevertheless, we believe that in order to guard the important values of federalism and local self-government there should be a clear attempt made to distinguish between commerce "among the states" and commerce which is "internal to a state" as well as to distinguish between actions which are "commercial" and those which are not.

In *Morrison* the Chief Justice for the Court wrote "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." We respectfully suggest that, a "categorical rule" stating that noneconomic activity is beyond the reach of the commerce power would indeed be very helpful.

As Justice Thomas wrote in his concurring opinion in *Lopez* : "Under our jurisprudence, if Congress passed an omnibus 'substantially affects interstate commerce' statute, purporting to regulate every aspect of human existence, the Act apparently would be constitutional. Such a formulation of federal power is no test at all: it is a blank check." Justice Thomas has suggested the need for putting some limits on this blank check. The statement that the Court has simply *not yet* allowed Congress to regulate noneconomic activity leaves the door (or the checkbook) wide open. The regulation of ordinary noneconomic activity, is an area of law reserved to local governments.[7]

A second implicit restriction in the commerce clause is between matters of local and of national concern. As Justice O'Connor wrote for the majority in *New York*:

> The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses: first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities. . . . The volume of interstate commerce and the range of commonly accepted objects of government regulation have, however, expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly

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[7] Justice Thomas in section 2 of his dissent also ably distinguished between "commerce" properly understood, and other forms of non-commerical economic activity.

come within the scope of Congress' commerce power.

We believe that the decisions in *Lopez, Morrison* and *Jones* require a much stronger distinction to be made (than the court might have made 20 years ago) between national and local, as well as between actions which are "commercial" and those which are simply affect commerce in some broad sense.

As late as 1938 this Court still declared:

> "The subject of federal power is still `commerce,' and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains." 'Activities local in their immediacy do not become interstate and national because of distant repercussions.' (*Santa Cruz Co. v. Labor Board*, 303 U.S. 453, 466).

As Justice White noted:

> It is clear from the debates leading up to the adoption of the Constitution that the commerce to be regulated was that which the States themselves lacked the practical capability to regulate. See, e. g., 1 M. Farrand, The Records of the Federal Convention of 1787 (rev. ed. 1937); The Federalist Nos. 7, 11, 22, 42, 45. (*Garcia* dissent)

This seems to be the clear meaning of Madison's statement in Federalist 14 that: "In the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects which concern all the members of the republic [that is, the states], but which are not to be attained by the

separate provisions of any."

This was clearly the original understanding of the phrase "commerce among the states." It has been acknowledged by this Court that the understanding of "commerce among the states" differs dramatically from the understanding those words had for the Founding generation.[8] This Court will probably not return to the original intent of the Founders, but we think that it is good to bear in mind just how far commerce clause jurisprudence has strayed in the last century, and the important affects that change has had on local government.

It is good to bear in mind, for example, that when Franklin Roosevelt took office municipal and county government collected about 55% of total government revenue – more than twice as much as the federal government. Today federal share of revenue has risen to nearly 70%, and the local share is barely above 10%.[9] Local government, once the most important (and still the most democratic and representative level of government) has been reduced to playing an almost trivial role in American society. It is true that most of the functions affecting people in their daily lives are still run by local governments (schools, libraries, fire protection, police, ambulance, health inspection, water and sewage, waste disposal, and so on) but all of these function have increasingly come under federal supervision and control. The

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[8] "[O]ur interpretation of the Commerce Clause has changed as our Nation has developed. We need not repeat that detailed review of the Commerce Clause's history here; it suffices to say that, in the years since *NLRB* v. *Jones & Laughlin Steel Corp.*, (1937), Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted" (Morrison).

[9] Source, The Tax Foundation, "The Price of Civilized Society," 2000.

expansion of the commerce clause has been a major part in this shift, as more and more functions, once thought to inhere primarily in municipal government, have been preempted and usurped by Congress.

III. Fundamental Principles of Federalism are at Stake

Justice White noted in his *Garcia* dissent that:

> [T]he harm to the States that results from federal overreaching under the Commerce Clause is not simply a matter of dollars and cents. *National League of Cities*, 426 U.S., at 846 -851. Nor is it a matter of the wisdom or folly of certain policy choices. Cf. ante, at 546. Rather, by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.
>
> As Justice O'Connor agreed in her opinion in *Gregory*:
>
> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Every time Congress takes over another function of local government all of these important aspects of federalism are

damaged. The increasing prospect of uniform commercial regulations throughout the United States threatens to utterly destroy these advantages of federalism. It is also beneficial to note that these advantages of federalism have been embraced by all members of the Court. Even the dissenting Justices in *Morrison* declared: "No one denies the importance of the Constitution's federalist principles. Its state/federal division of authority protects liberty--both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is closer to home"(Justice Breyer, joined by JJ. Stevens, Souter and Ginsburg).

It is an axiom that "power given will be exercised" This Court has previously noted "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . . ."(*INS v. Chadha*, 462 U.S. 919 at 951 (1983)). If Congress is given the green light to regulate any and all economic activity under the auspices of the commerce clause the result would be that "all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint" (O'Connor, dissent in *Garcia*).

CONCLUSION

Justice White wrote in his dissent for *Garcia*:

> In *National League of Cities*, we spoke of fire prevention, police protection, sanitation, and public health as "typical of [the services] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S., at 851 . Not only are these activities remote from any normal concept of interstate commerce, they are also activities that epitomize the concerns of local, democratic self-

> government. In emphasizing the need to protect traditional governmental functions, we identified the kinds of activities engaged in by state and local governments that affect the everyday lives of citizens. These are services that people are in a position to understand and evaluate, and in a democracy, have the right to oversee. We recognized that "it is functions such as these which governments are created to provide . . ." and that the States and local governments are better able than the National Government to perform them.

We believe these are wise and profound words. Moreover, the type of municipal towing regulations at stake in the current case clearly fall into the type of "traditional government function" remote from any normal concept of interstate commerce. Yet, the values of local democratic self-government at stake in the case go far beyond mere towing regulations. If Congress may preempt even such purely local traditional functions, then it is hard to see where there might be an end to what Congress might preempt. It is not an exaggeration to say, as did the dissent in *Garcia*, that the very survival of state and local sovereignty in any meaningful sense is on the line and that the powers of state and local governments are in danger of being reduced to only the trivial roles which Congress allows.

For these reasons, we urge that the Sixth Circuit ruling be *reversed.*

Respectfully submitted,
Kenneth B. Clark, February 19, 2002